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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

HENRY BREWER, *et al.*,
Appellants,

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Appellees.

**On Appeal From
the North Carolina
Court of Appeals**

JURISDICTIONAL STATEMENT

James Hamilton
Counsel of Record

Robert L. Deitz

Ginsburg, Feldman and Bress,
Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, NC 27106
Attorneys for Appellants

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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment prohibit annexations by municipalities that are arbitrary and capricious?

2. Does the due process clause continue to require judicial review by state courts of constitutional challenges to state action?

3. Does the judicial review provision of the North Carolina annexation statute violate the due process clause on its face and as applied to the annexation before the Court because this provision does not allow state court review of significant constitutional issues -- for example, whether an annexation is arbitrary and capricious?

PARTIES

Appellants in this case are

Henry Brewer, Robert M. Burcham, Philip Demarko, Joy M. McNab, Gladys Norman, Sam Pope, James A. Sneed, Cornelius F. Spach, Ray W. Sizemore, and John Gillespy.

Appellees are

City of Winston-Salem, N.C., Mayor Wayne A. Corpening, Vivian H. Burke, Marilyn S. Harpe, Larry D. Little, Virginia K. Newell, Robert S. Northington, Jr., Ernestine Wilson, Larry W. Womble and Martha S. Wood.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 5

STATEMENT OF THE CASE 6

THE SUBSTANTIAL QUESTIONS PRESENTED REQUIRE PLENARY REVIEW.....15

CONCLUSION 56

APPENDICES

Appendix A 1a

Appendix B 1b

Appendix C 1c

Appendix D 1d

Appendix E 1e

Appendix F 1f

Appendix G 1g

TABLE OF AUTHORITIES

Cases:	Page
Adams v. City of Colorado Springs, 308 F. Supp. 1397 (D. Colo.) aff'd, 399 U.S. 901 (1970)	9-40
Allgeyer v. Louisiana, 165 U.S. 578 (1897)	28
Avery v. Midland County, 390 U.S. 474 (1968)	39
In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981)	10,11,41,4
Baker v. Carr, 369 U.S. 186 (1962)	32
Baldwin v. City of Winston-Salem, N.C., 710 F.2d 132, cert. denied, 104 S. Ct. 536 (1983)	passim
Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833)	24
Boddie v. Connecticut, 401 U.S. 371 (1971)	35
Brown v. New Jersey, 175 U.S. 172 (1899)	27
Califano v. Sanders, 430 U.S. 99 (1977)	53

Carlisle v. City of Charlotte, 543 F. Supp. 625 (W.D.N.C. 1982) 2,7

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 27

Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418 (1890) 47

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 39

Cooper v. Aaron, 358 U.S. 1 (1958) 39

Coppage v. Kansas, 236 U.S. 1 (1915) 28

Crowell v. Benson, 285 U.S. 22 (1932) 52

Davidson v. New Orleans, 96 U.S. 97 (1877) 26

Doyle v. Municipal Commission of Minnesota, 340 F. Supp. 841 (D. Minn.) aff'd, 468 F.2d 620 (8th Cir. 1972) 39

Duncan v. Louisiana, 391 U.S. 145 (1968) 32

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 45

Fiske v. Kansas, 274 U.S. 380 (1927) 29

Florida ex rel. Davis v. City of Stuart, 97 Fla. 283, 120 So. 335 (1929) 37,54

Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980) 44

Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) 24

Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967) 40

Gideon v. Wainwright, 372 U.S. 335 (1963) 31

Gitlow v. New York, 268 U.S. 652 (1925) 29,31

Goldberg v. Kelly, 397 U.S. 254 (1970) 33

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 14,33

Hayward v. Clay, 573 F.2d 187 (4th Cir.), cert. denied, 439 U.S. 959 (1978). 14

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 38

Humphries v. City of Jacksonville, 300 N.C. 186, 265 S.E.2d 189 (1980) 44

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) ..... passim

Hurtado v. California,
110 U.S. 516 (1884) 34

Ingraham v. Wright,
430 U.S. 651 (1977) 35

Johnson v. Robison,
415 U.S. 361 (1974) 52

Klopfer v. North Carolina,
386 U.S. 213 (1967) 31

Kramer v. Union Free School
District, 395 U.S. 621 (1969) 32,38

Lambert v. California, 355
U.S. 225 (1957) 38,39

Lochner v. New York,
198 U.S. 45 (1905) 28,29

Malloy v. Hogan,
378 U.S. 1 (1964) 31

Mapp v. Ohio,
367 U.S. 643 (1961) 31

Milliken v. Bradley, 418
U.S. 717 (1974) 39

Missouri v. Chicago, B. &
Q.R. Co., 241 U.S. 533 (1915) 49

Moody v. Town of Carrboro, 301
N.C. 318, 271 S.E.2d 265 (1980) 40,44

Moorman v. Wood, 504
F. Supp. 467 (E.D. Ky. 1980) 39

Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947) 36,37,54

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 51

O'Brien v. Skinner, 414 U.S. 524 (1974) 45

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937) 35

Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) 48

In re Oliver, 333 U.S. 257 (1948) 31

O'Neil v. Vermont, 144 U.S. 323 (1892) 27

Perry v. Sindermann, 408 U.S. 593 (1972) 33

Plyler v. DOE, 451 U.S. 968 (1982) 39

Pointer v. Texas, 380 U.S. 400 (1965) 31

Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952) 37,54

Pressler v. Illinois, 116 U.S. 252 (1886) 26

Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235 (1949) 36,37,54

Raintree Homeowners Association v. City of Charlotte, 543 F. Supp. 625 (W.D.N.C. 1982) 44

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Reynolds v. Sims, 377 U.S. 533 (1964) 32,33

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) ..... passim

Slochower v. Board of Higher Education of New York, 350 U.S. 551 (1956) 34

Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) 24

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 32,33

St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936) 50,51

Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919) (Brandeis, J.) 39

Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976) 40

Texas ex rel. Walker v. City of Gladewater, 139 S.W.2d 283 (Tex. Civ. App. 1940) 37,54

Twining v. New Jersey,
211 U.S. 78 (1908) 27,30

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92 U.S. 542 (1875) 27

Ungar v. Smith, 667 F.2d
188 (D.C. Cir. 1981) 53

Wadley S.R. Co. v. Georgia,
235 U.S. 651 (1915) 48

Washington v. Texas,
388 U.S. 14 (1967) 32

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422 U.S. 749 (1975) 53

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61 U.S. (20 How.) 84 (1857) 24

Wolff v. McDonnell,
418 U.S. 539 (1974) 35

Statutes and Regulations:

U.S. Const. amend. XIV, § 1 ..... passim

5 U.S.C. § 706 (2)(A) 51

28 U.S.C. § 1257(2) 1,4

28 U.S.C. § 2403(b) 4

N.C. Gen. Stat. § 160A-47 42

N.C. Gen. Stat. § 160A-48 42

N.C. Gen. Stat. § 160A-50 ..... passim

Rule 14, N.C. Rules of
Appellate Procedure 3

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of Law Before the Civil War,
24 Harv. L. Rev. 366 (1911) 27

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Reunion, 1864-88 (Part One) (6
History of the Supreme Court of
the United States at 1260-1300 25

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& Jurisdictional Fact, 70 Harv.
L. Rev. 953 (1957) 51

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The Fourteenth Amendment, 39
Harv. L. Rev. 431 (1926) 28

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Appellees.

On Appeal from the North Carolina
Court of Appeals

Jurisdictional Statement

Appellants hereby appeal to this Court, pursuant to 28 U.S.C. § 1257(2) and Rules 10, 11, and 12 of the Rules of this Court, from the North Carolina

Court of Appeals in the case of Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al.

OPINIONS BELOW

The judgment of the Superior Court, Forsyth County, is not reported and is set forth at Appendix A. The opinion of the North Carolina Court of Appeals is reported at 312 S.E.2d 517 and is set forth at Appendix B. The order of the North Carolina Supreme Court denying discretionary review is unreported and is set forth at Appendix C.

JURISDICTION

In a suit filed in the North Carolina Superior Court, appellants Brewer, et al., challenged the North Carolina annexation statutes, N.C. Gen. Stat. § 160A-50, as being repugnant to

the Fourteenth Amendment to the U.S. Constitution. The Superior Court upheld the validity of the state statute. See App. A.

On appeal, the North Carolina Court of Appeals affirmed the lower court decision in an opinion and judgment entered March 6, 1984. That court upheld the validity of the North Carolina annexation statute against appellants' Fourteenth Amendment challenge. See App. B.

On April 30, 1984, the North Carolina Supreme Court declined to assume appellate jurisdiction and denied the discretionary review sought by appellants to renew their challenge under the Fourteenth Amendment to the North Carolina annexation statute. See App. C; Rule 14 N.C. R. App. Pro.

Appellants filed a notice of appeal, which is set forth in Appendix D, on July 25, 1984, with the North Carolina Court of Appeals, from whose judgment this appeal is taken and which possesses the record of this case.

Because the constitutionality of a state statute is drawn in question in this case, 28 U.S.C. § 2403(b) may be applicable.

In accordance with Rule 28.4(c) of the Rules of this Court, appellants have served a copy of this jurisdictional statement on the Attorney General of North Carolina.

Jurisdiction over the appeal in this case is conferred upon the Court by 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions are pertinent to this case: section 1 of the Fourteenth Amendment to the U.S. Constitution, set forth in Appendix E; N.C. Gen. Stat. § 160A-50, set forth in Appendix F.

STATEMENT OF THE CASE

This case, which involves a challenge to an annexation by Winston-Salem, North Carolina, concerns the limits that the due process clause of the Fourteenth Amendment places on municipal annexations.

On July 6, 1982, the Board of Alderman of the City of Winston-Salem, North Carolina, adopted an ordinance annexing several areas into the city. Included were areas designated A-1, E-1, E-2 and E-3, which are involved in this appeal.

On August 18, 1982, appellants initiated this action by filing a petition for judicial review of the annexation ordinance in the Forsyth County, North Carolina, Superior Court. That petition alleged, inter alia, that

the annexation was arbitrary, capricious, and unreasonable, and violated the due process clause of the Fourteenth Amendment.

In support of this contention, plaintiffs (appellants here) alleged the following:

1) Defendants (appellees here) arbitrarily and unreasonably have gerrymandered the borders of the areas proposed for annexation to include large, valuable tracts not developed for urban purposes whose inclusion within the area is permissible under the state statute only when annexed along with other areas.1/

1/ For example, the areas designated E-2 and E-3 are comprised largely of farm land. Area E-2 contains 238.35 acres, but its population is only 70 people, or .25 persons per acre. Area E-3 contains 123.56 acres, but its population is only 6

[Footnote continued]

2) Defendants arbitrarily and unreasonably are pursuing the proposed annexation solely or primarily to gain tax revenues and to increase the city's portion of revenue sharing funds.2/

3) Defendants arbitrarily and unreasonably are attempting to annex properties that presently have services generally superior to those available in the city and that do not need the services the city intends to provide.3/

[Continued from previous page]

people or .05 persons per acre. Moreover, by arbitrarily manipulating boundaries, defendants annexed 355 acres of valuable Hanes Hosiery property in Area A-1 on which there are no residents.

2/ To illustrate, by annexing Hanes Hoisery property in Area A-1, the city achieved more than an additional $260,000 in tax revenues a year at 1982 rates, but incurred almost no additional expenses for services.

3/ For example, a large portion of Area A-1 included no residential

[Footnote continued]

4) Apparently to meet statutory standards, defendants arbitrarily and unreasonably deleted properties from the proposed annexation that are integral parts of the areas involved. In various instances, part of a property is taken into the city and part is left in the county.

5) Defendants arbitrarily and unreasonably are attempting to annex certain reasonably affluent areas, while declining to annex other developed, eligible areas in need of city services that are closer to the city's main business district than portions of the annexed areas, or are less affluent and

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[Continued from previous page]

units, but contained only valuable Hanes Hoisery property that was fully serviced and had no need for city services.

have lower tax bases than the annexed areas.

These allegations were met by a motion in limine filed by defendants, which is attached as Exhibit G. Defendants asserted that, under the judicial review provisions of the North Carolina annexation statute, N.C. Gen. Stat. § 160A-50(f), see App. F, and the North Carolina Supreme Court's decision in In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), a reviewing court could take evidence intended only to show:

> (1) that the statutory procedure for annexation was not followed;
>
> (2) that the provisions of the North Carolina law concerning required documents and plans for city services were not met; or
>
> (3) that the provisions of the North Carolina law setting forth very

> flexible criteria regarding, e.g., population density, lot size and contiguousness have not been met.

In response, plaintiffs asserted that the statute restricting review to these three areas -- and denying plaintiffs the right to raise constitutional claims -- was itself unconstitutional on its face and as applied in this case. The Superior Court, however, granted defendants' motion, ruling that plaintiffs were limited to submitting evidence relating to the three specified areas. The court also ruled that the judicial review provision of the North Carolina annexation statute is constitutional. App. A.

The Superior Court entered final judgment for defendants on November 12, 1982. Plaintiffs appealed the denial of

their constitutional claims to the North Carolina Court of Appeals, and on March 6, 1984, that court affirmed the Superior Court's judgment. App. B.

Following In re Annexation Ordinance, supra, and other cases, the court of appeals held that the statute "limits the scope of judicial review" to the three areas specified above and that the annexation could not be reviewed separately to determine its "reasonableness." App. 5b. The court concluded, however, that the effect of the statute is to provide "substantial protection" against arbitrary, capricious and unreasonable municipal conduct. App. 6b.

More important, the North Carolina Court of Appeals found that plaintiffs' due process claim "is not actionable

under the Fourteenth Amendment." App. 7b. In this it relied on Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.) cert. denied, 104 S.Ct. 536 (1983), which in turn had followed Hunter v. Pittsburgh, 207 U.S. 161 (1907). The court of appeals noted that Hunter declared that "annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislation to regulate." App. 9b. Hunter, the North Carolina Court of Appeals continued, holds that a state's conduct in annexations is "beyond the reach of the Fourteenth Amendment." Id. The only exceptions to this rule, the court of appeals observed, are that annexations can be challenged under the Fourteenth Amendment if the claim involves "racial

discrimination or infringement of voting rights." Id. For this proposition, the court of appeals cited Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Hayward v. Clay, 573 F.2d 187 (4th Cir.), cert. denied, 439 U.S. 959 (1978). The North Carolina Court of Appeals thus concluded that the claim that an annexation is unconstitutional under the due process clause because it was arbitrary and capricious, or was not subjected to adequate judicial review, fails to state a cause of action. App. 10b.

On April 10, 1984, plaintiffs filed a notice of appeal and petition for discretionary review by the Supreme Court with the North Carolina Supreme Court. That court declined to assume appellate jurisdiction and denied

discretionary review on April 30, 1984. App. C. Appellants thus appeal from the decision and judgment by the North Carolina Court of Appeals.

THE SUBSTANTIAL QUESTIONS PRESENTED REQUIRE PLENARY REVIEW

Introduction

In Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983) -- which involved, inter alia, the annexation at issue in this appeal -- petitioners Baldwin, et al. sought review of the Fourth Circuit's ruling that their complaints did not state a cause of action under the Fourteenth Amendment's due process clause.4/

4/ The Petition for Writ of Certiorari was supported in a Brief Amici Curiae by 22 North Carolina organizations, including the North Carolina Farm Bureau Federation,

[Footnote continued]

Petitioners claimed in this Court and in the lower courts that the annexations involved were arbitrary and capricious, were consummated under a statute that does not allow review of basic constitutional questions, and thus were unconstitutional. In reply, respondents in Baldwin -- appellees here -- asserted that all constitutional questions would be reviewed by North Carolina state courts: "It is very clear from the decisions of the North Carolina Supreme Court that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Petitioners."5/

[Continued from previous page]
Inc., which represented or served more than 460,000 North Carolina citizens.

5/ "Brief in Opposition to Petition For Writ of Certiorari," at 21 in

[Footnote continued]

Incredibly, respondents made this claim after they had filed and prevailed on the motion in limine in this case. See App. G. Acting on that motion, the superior court ruled that it would consider only the three matters specified in the annexation statute and would not consider evidence to support the claim that the annexation was unconstitutionally arbitrary and capricious. The court of appeals agreed with the superior court that the statute limited review to those three issues, and the North Carolina Supreme Court declined to review the court of appeals' ruling.

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Baldwin v. City of Winston-Salem, supra.

Thus, it is now perfectly clear that the North Carolina law is precisely what petitioners in Baldwin claimed it was. To repeat, under the North Carolina statute, a state court reviewing annexations can examine only whether the prescribed procedures are met, whether certain documents such as plans for city services have been prepared, and whether the area annexed has certain characteristics regarding, for example, contiguousness, lot size, and population.

The North Carolina statute -- coupled with the holdings by the North Carolina Court of Appeals and the Fourth Circuit that a claim that an annexation is arbitrary and capricious does not state a cause of action under the Fourteenth Amendment's due process

clause -- leaves North Carolina residents subjected to arbitrary annexations with nowhere to turn. They cannot raise this claim in a North Carolina state court because the statute does not allow it. They cannot raise this claim in a federal court in North Carolina because the Fourth Circuit, relying on Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) -- but ignoring more recent decisions from this Court -- has ruled that the assertion that an annexation is "merely arbitrary and capricious" does not state a federal claim. 710 F.2d at 135. This Court should now act to end this pernicious situation that strands North Carolina residents without a remedy for arbitrary conduct.

Specifically, this Court should firmly hold that the due process clause of the Fourteenth Amendment applies to the annexation process and prohibits arbitrary state conduct. When Hunter was decided in 1907, the Fourteenth Amendment was fewer than forty years old. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which roundly rejected the applicability of the Bill of Rights to the states through the Fourteenth Amendment, dominated constitutional jurisprudence. Indeed, only one provision of the Bill of Rights had been "incorporated" under the Fourteenth Amendment when Hunter disclaimed any federal interest in municipal annexations. The modern expansive reading of the due process clause had not yet taken hold.

Part A of this statement begins by briefly setting forth the development of Fourteenth Amendment law. This historical review demonstrates that the legal principles informing Hunter have long since been overruled and that, as a consequence, Hunter itself has lost much of its precedential force. Part A concludes by showing that appellants' allegations of arbitrary state conduct constitute a federal cause of action under well-established Fourteenth Amendment doctrine.

Part B demonstrates that North Carolina's failure to provide judicial review for constitutional challenges to municipal conduct violates almost half-a-century of settled Fourteenth Amendment law.

A. Arbitrary State Conduct Violates The Fourteenth Amendment

The North Carolina Court of Appeals held that appellants' allegations of arbitrary state conduct failed to state a cause of action because annexations are "purely [ ] state political or legislative matter[s]" and generally immune from Fourteenth Amendment scrutiny. App. 9b. The Court relied principally on Baldwin v. City of Winston-Salem 710 F.2d 132 (4th Cir.), cert. denied 104 S.Ct. 536 (1983), which in turn expressly followed Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). Although Hunter actually adjudicated a very narrow question -- whether citizens of one municipality by their vote alone may defeat annexation by another municipality -- its broadly phrased rationale tended to suggest that all decisions

relating to municipal boundaries are beyond the reach of the Fourteenth Amendment. Thus, the Hunter Court held that a state, among other things, may alter "at its pleasure" the boundaries of a municipality "conditionally or unconditionally, with or without the consent of the citizens, or even against their protest." 207 U.S. at 178-79.

Hunter's narrow reading of the Fourteenth Amendment followed the established precedents of its day, for when Hunter was decided in 1907 the due process clause placed few restrictions on state conduct of any sort. Indeed, the gradual process of "incorporating" the Bill of Rights essentially was not to begin for another twenty years. Prior to passage of the Fourteenth Amendment, it was settled law that the

Bill of Rights did not restrain state action. In 1833, Chief Justice Marshall held that "[t]hese Amendments contain no expression indicating an intention to apply them to the State governments," Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a view that the Court reaffirmed on other occasions. See, e.g., Withers v. Buckley, 61 U.S. (20 How.) 84 (1857); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847).

Ratification of the Fourteenth Amendment did not immediately upset this settled doctrine. In the Supreme Court's first interpretation of the Civil War Amendments in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), Justice Miller rejected the

argument that the Fourteenth Amendment was intended "radically [to] change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people...." 83 U.S. (16 Wall.) at 78. Noting that the "one pervading purpose" underlying the Civil War Amendments was the "freedom of the slave race," 83 U.S. (16 Wall.) at 71, the Court rejected the idea that the Fourteenth Amendment had an impact beyond the problems that spawned it. See generally C. Fairman, Reconstruction and Reunion, 1864-88 (Part One) (6 History of the Supreme Court of the United States) at 1260-1300; G. Gunther, Constitutional Law (1975 ed.) at 486-505.

Over the next twenty years, the Supreme Court consistently rebuffed attempts to read the Fourteenth Amendment more expansively. In a variety of contexts,6/ the Court held that neither the privileges and immunities clause nor the due process clause was a limitation against state encroachment on personal freedoms. See, e.g., Pressler v. Illinois, 116 U.S. 252 (1886) (right

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6/ Five years after the Slaughter-House Cases were decided, Justice Miller expressed his surprise that counsel continued to advocate positions seemingly foreclosed by that case. "[T]he docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment." Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

to keep and bear arms neither a privilege and immunity nor a liberty); United States v. Cruikshank, 92 U.S. 542 (1875) (right to peaceable assembly not a privilege and immunity); O'Neil v. Vermont, 144 U.S. 323 (1892) (right to be free from cruel and unusual punishment not a privilege and immunity); Brown v. New Jersey, 175 U.S. 172 (1899) (right to jury trial not part of due process); Twining v. New Jersey, 211 U.S. 78 (1908) (right against self-incrimination not within due process clause). But see Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (recognizing Fourteenth Amendment right to compensation for property taken by state). See generally Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366

(1911); Warren, The New "Liberty" Under The Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926).

The initial shift in due process analysis came with this Court's decision in Allgeyer v. Louisiana, 165 U.S. 578 (1897). In the first of the so-called substantive due process decisions, the Court held that a Louisiana statute concerning property insurance violated liberty of contract under the Fourteenth Amendment. The Court invoked substantive due process analysis over the next 35 years to invalidate a host of state statutes. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (state labor law limiting the length of the work week held a violation of the Fourteenth Amendment); Coppage v. Kansas, 236 U.S. 1 (1915) (law protecting labor

organizing efforts held unconstitutional).

Despite a willingness during the Lochner era to protect economic interests as a "liberty" under the Fourteenth Amendment, the Supreme Court continued to reject claims that the fundamental personal rights guaranteed against federal encroachment by the Bill of Rights were also protected against state incursions by the Fourteenth Amendment. Not until 1925, when the Court first held that free speech was a liberty under the Fourteenth Amendment, did the gradual process of "incorporation" and expansion of Fourteenth Amendment protections begin. Gitlow v. New York, 268 U.S. 652 (1925); accord, Fiske v. Kansas, 274 U.S. 380 (1927).

The historical forces that ineluctably led to the Hunter decision are apparent from this brief review of the development of due process law. In 1907, when Hunter was decided, the Slaughter-House Cases continued to bar challenges to state laws abridging personal freedoms 7/ -- at least those outside the economic realm. The process of incorporating the specific guarantees of the Bill of Rights into the Fourteenth Amendment was still eighteen years away. It is equally apparent, however, that Hunter -- or at least its broader dictum -- should have little continuing precedential force.

7/ Justice Moody, author of Hunter, also wrote the opinion for the Court in Twining v. New Jersey, 211 U.S. 78 (1908), which held that the privilege against self-incrimination was not guaranteed by the Fourteenth Amendment.

First, the intellectual antecedents of Hunter -- the Slaughter-House Cases and their progeny -- are clearly no longer law. Since 1925, the Supreme Court has held that, through the Fourteenth Amendment, the states are bound by virtually all the provisions of the Bill of Rights. See Gitlow v. New York, 268 U.S. 652 (1925) (free speech, press, religion); Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unlawful searches); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from compelled self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); In re Oliver, 333 U.S. 257 (1948) (right to public trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront

opposing witnesses); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process). See generally Duncan v. Louisiana, 391 U.S. 145 (1968).

Even outside the specific protections afforded by the Bill of Rights, the due process clause now provides substantial constraints that are inconsistent with the dictum in or the reasoning underlying Hunter. For example, the Fourteenth Amendment now requires equal apportionment of votes among a state's citizens, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964), and prohibits, absent a compelling state interest, burdens on the right to vote. Kramer v. Union Free School District, 395 U.S. 621 (1969). It limits summary prejudgment remedies in civil litigation. Sniadach

v. Family Finance Corp., 395 U.S. 337 (1969). The Fourteenth Amendment requires a hearing before the denial of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), and, in some situations, a hearing before a contract of employment with the state is not renewed. Perry v. Sindermann, 408 U.S. 593 (1972).

Second, the key principle of Hunter -- that the state "at its pleasure" may "expand or contract the territorial area" of a municipality, 207 U.S. at 178 -- is simply no longer true. For example, gerrymandering the boundaries of a city to disenfranchise black voters violates the Fifteenth Amendment. Gomillion v. Lightfoot, 364 U.S. 339 (1960); see Reynolds v. Sims, 377 U.S. at 566 (discrimination in voting

violates Fourteenth Amendment). But more generally, the notion that a municipality may take action against persons or property "at its pleasure" is abhorrent to the idea of due process.

No principle is more fundamental to constitutional government than the prohibition against arbitrary conduct by a state. At least as early as Hurtado v. California, 110 U.S. 516 (1884), this Court identified the basic conflict between arbitrariness and due process of law. "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude." 110 U.S. at 536. In Slochower v. Board of Higher Education of New York, 350 U.S. 551, 559 (1956),

the Court reaffirmed the importance of the "'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." (quoting Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 (1937)). In Wolff v. McDonnell, 418 U.S. 539, 558 (1974), the Court said that "[t]he touchstone of due process is protection of the individual aginst arbitrary action of government." Accord, Ingraham v. Wright, 430 U.S. 651, 672-73 (1977). Certainly an annexation decided by lot or bribery, although at the state's "pleasure," would not comport with the due process clause.8/

8/ "[T]he right to due process reflects a fundamental value in our American Constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374 (1971). The Fourth Cir-

[Footnote continued]

Petitioners do not seek a ruling from this Court that will interject the federal courts into annexation procedures. Unlike North Carolina, courts in other states will entertain constitutional challenges to arbitrary annexations. See, e.g., Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235 (1949); cf. 5 U.S.C. § 706(2)(A) (authorizing federal courts to strike down "arbitrary [and] capricious" agency action). A decision by this Court that due process prohibits arbitrary

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> cuit's conclusion in the Baldwin case that there is no "fundamental" due process right to be free from arbitrary conduct simply is not tenable. See 710 F.2d at 135 n.3.

annexations undoubtedly will result in review by North Carolina courts of this constitutional issue. See Part B, infra.

Petitioners also do not seek a ruling by this Court that the conduct alleged in this case is unconstitutional. Whether the conduct alleged here is in fact arbitrary should be decided later by North Carolina courts.9/

9/ Annexation conduct similar to that challenged in this case has been held arbitrary and unconstitutional by various state courts in authoritative, well-reasoned opinions. See, e.g., Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 1135 (1952); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235, 242 (1949); Texas ex rel. Walker v. City of Gladewater, 139 S.W.2d 283, 286 (Tex. Civ. App. 1940); Florida ex rel. Davis v. City of Stuart, 97 Fla. 283, 120 So. 335, 345 (1929).

Petitioners seek only a narrow ruling that an arbitrary and capricious annexation violates due process -- that, contrary to Hunter, due process prohibits arbitrary action regarding annexations taken at the state's "pleasure."

The Court has already recognized that some of the "broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases. . . ." Holt Civic Club v. City of Tuscaloosa, 439 U.S. at 71 (citing Kramer v. Union Free School District, 395 U.S. 621 (1969)). The broader dictum of Hunter has thus become, in the words of Mr. Justice Frankfurter, a "derelict on the waters of the law." Lambert v. California, 355

U.S. 225, 232 (1957) (dissenting opinion). This Court should now hold that due process principles regulate the process of municipal annexations and prevent arbitrary and capricious conduct.10/

10/ It is not acceptable to contend that the due process clause applies only to matters other than annexations. This Court repeatedly has affirmed that both the due process and the equal protection clauses apply to "every" state action, including actions by municipalities. E.g., Plyler v. Doe, 451 U.S. 968 (1982); Avery v. Midland County, 390 U.S. 474, 480 (1968). See also Columbus Board of Education v. Penick, 443 U.S. 449, 457 n.5 (1979); Milliken v. Bradley, 418 U.S. 717, 744 (1974); Cooper v. Aaron, 358 U.S. 1, 16-17 (1958); Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919) (Brandeis, J.). More specifically, several federal cases -- Moorman v. Wood, 504 F. Supp. 467, 473, 477 (E.D. Ky. 1980); Doyle v. Municipal Commission of Minnesota, 340 F. Supp. 841, 844 (D. Minn.), aff'd, 468 F.2d 620 (8th Cir. 1972); Adams v. City of Colorado Springs, 308 F. Supp.

[Footnote continued]

B. The Due Process Clause Requires State Judicial Review Of All Constitutional Challenges To State Annexations

In the present case, the North Carolina Court of Appeals held that, under N.C. Gen. Stat. § 160A-50(f), state courts may review an annexation to determine only if certain easily adhered to statutory requirements are met.11/ App. 4b-5b. It also ruled that state

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1397, 1405 (D. Colo.), aff'd, 399 U.S. 901 (1970) -- expressly state that annexations and annexation procedures are governed by due process principles and that arbitrary annexations run afoul of the Fourteenth Amendment.

11/ Section 160A-50(f) provides the only means to challenge annexations in the North Carolina state courts. E.g., Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980); Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967).

courts may not separately examine an annexation to determine if it is arbitrary and unreasonable, and thus unconstitutional. App. 5b.

The court of appeals principally relied on In Re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), which involved annexations by Winston-Salem not now before this Court. In that case the plaintiffs presented evidence demonstrating that the annexations were arbitrary, unreasonable and improperly motivated. The Superior Court, however, declined to consider such evidence and excluded similar evidence.

The North Carolina Supreme Court affirmed the lower court, stating:

> The superior court's review of the annexation ordinance of a municipal governing body is limited by statute. Upon review the judge may examine the annexation proceedings

> to determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes . . . .
>
> G.S. 160A-50(f) provides in effect that on judicial review the court may hear oral arguments, receive written briefs, and may take evidence intended to show,
>
> (1) that the statutory procedure was not followed, or
>
> (2) that the provisions of G.S. 160A-47 [concerning required documents and plans for city services] were not met, or
>
> (3) that the provisions of G.S. 160A-48 [concerning whether an area meets very flexible criteria regarding e.g., population density, lot size and contiguousness] have not been met.
>
> This section clearly specifies the inquiries to which the court is limited.

278 S.E.2d at 230-31 (emphasis added).

The court concluded that state courts could not separately examine the "reasonableness" of an annexation. 278 S.E.2d at 231. And it said:

> The legislature has the right, unhampered by constitutional restrictions, to grant the power given in the annexation statute under the consideration to municipalities having a population of five thousand or more since the power is incidental to municipal government in matters of purely local concern.

278 S.E.2d at 228 (emphasis added).12/

12/ The provision specifying a state court's options if it finds an annexation faulty -- N.C. Gen. Stat. § 160A-50(g) -- is also significant. Under this provision, a court may only:

(1) Remand so that proper procedures can be followed, if petitioners were "materially injured" by the failure to do so;

(2) Remand for amendment of annexation boundaries to adhere to the statutory provision specifying the nature of the area that can be annexed; or

(3) Remand for amendment of the plans for provision of city services in order to meet statutory standards.

Invalidation of an annexation because it is arbitrary or unreasonable is not allowed by this pro-

[Footnote continued]

To the same effect are Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980), Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265, 268 (1980), and Humphries v. City of Jacksonville, 300 N.C. 186, 265 S.E.2d 189, 190 (1980). See also Raintree Homeowners Assoc. v. City of Charlotte, 543 F. Supp. 625 (W.D.N.C. 1982), aff'd 710 F.2d 132 (4th Cir,), cert. denied (1983). Interpretations of a state statute by the state's highest court are, of course, binding on this

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> vision. As In Re Annexation Ordinance illustrates, North Carolina courts have considered whether the annexation statute is constitutional, but they may not review the conduct of city officials to determine whether they have acted unconstitutionally. See 278 S.E.2d at 229-32.

Court. O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

The result of the North Carolina Supreme Court decisions is that, for example, the following unconstitutional actions totally escape judicial scrutiny in North Carolina State courts:

a. An arbitrary gerrymandering of annexation borders solely to gain tax revenues, in order to include large amounts of valubable agricultural land that are not developed for urban purposes and need no city services.13/

13/ The appellants allege that gerrymandering of a similar nature occurred in the present case, but the state courts refused to review this claim.

b. An arbitrary attempt to annex an area to dilute a city's black vote and thus retain political power for white incumbents.

c. Abusive conduct by authorities who accept bribes to vote for an annexation.

It is thus impossible to conclude, as the court of appeals evidently did, that the statute gives adequate protection against arbitrary acts by a municipality.

This Court should hold that the judicial review provision of the North Carolina annexation statute is unconstitutional both on its face and as applied in this case.

Part A of this Statement outlined the changing imperatives of due process since ratification of the Fourteenth

Amendment in 1868. One principle, however, has remained unchanged for almost a century: that due process requires judicial review of constitutional challenges to state conduct. In Chicago, M. & St. P. R. Co. v. Minnesota, 134 U.S. 418 (1890), a railroad challenged rates set by a state commission, contending that they were unreasonably low and unequal. The state supreme court refused review on the ground that, under state law, the rates set by the commission were "final and conclusive." 134 U.S. at 456. On appeal, this Court reversed, holding that due process requires a judicial hearing on the railroad's constitutional challenge. "The question of the reasonableness of a rate of charge for transportation by a railroad company,

involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." 134 U.S. at 458. Accord, Wadley S.R. Co. v. Georgia, 235 U.S. 651, 660-61 (1915) (party affected by regulatory orders is "entitled, by the due process clause, to a judicial review . . . as to whether he has been thereby deprived of a right protected by the Constitution"); Missouri v. Chicago, B. & Q.R. Co., 241 U.S. 533, 537-38 (1915) (right to judicial review is "well-settled" principle).

This doctrine was reaffirmed in the leading case of Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

There a state utility commission, finding that a water company's rates were unreasonably high, reduced them. The Pennsylvania Supreme Court affirmed because the state statute made the commission's determinations conclusive. On appeal, the Supreme Court reversed, holding that denial of the opportunity for review of constitutional questions is itself a denial of due process of law. "[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289. Reversal was required

because "[t]hus far [the water company] has not succeeded in obtaining the review . . . which the Fourteenth Amendment requires the State to provide." Id.

In St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49-54 (1936), which involved a Department of Agriculture rate order, the Supreme Court recognized a similar Fifth Amendment due process right to judicial review of constitutional questions arising in federal administrative proceedings. In a well-known concurring passage, Justice Brandeis observed that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated

was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. at 84.14/ See 5 U.S.C. § 706(2)(A) (authorizing federal courts to reverse "arbitrary [and] capricious" agency conduct).

14/ The view expressed in Ben Avon and St. Joseph Stock Yards that, on appeals from administrative decisions, courts should review facts de novo has been criticized. See, e.g., Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 980-84 (1957). But cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.34 (1982). However, the requirement that constitutional questions arising from state or federal administrative proceedings must be subjected to judicial review unquestionably remains sound law.

The continuing vitality of this principle is shown by various decisions that have construed federal administrative statutes to allow judicial review in order to avoid the constitutional question that failure to provide review would raise.15/ For example, in Johnson v. Robison, 415 U.S. 361 (1974), where the constitutionality of a veterans benefit statute was challenged, the Government contended that judicial review was barred by a provision purporting to render all administrative

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15/ See Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

decisions final and unreviewable. Noting that a construction foreclosing constitutional challenges to the act would "raise serious questions concerning the constitutionality" of that statute, the Court read the statute to permit judicial review of such claims. 415 U.S. at 366. Accord, Califano v. Sanders, 430 U.S. 99, 109 (1977); Weinberger v. Salfi, 422 U.S. 749, 762 (1975).16/

16/ In Ralpho v. Bell, 569 F.2d 607, 618-22 (D.C. Cir. 1977), the Micronesian Claims Act was interpreted to allow judicial review of Claims Commission rulings allegedly offending due process in order to avoid the constitutional question that denial of review would present. The court said: "If the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function." 569 F.2d at 620. See also Ungar v. Smith, 667 F.2d 188, 193 (D.C. Cir. 1981) (statute interpreted to allow judicial

[Footnote continued]

Not surprisingly, even where no statute provided for review, various state courts have felt compelled to examine annexations alleged to be arbitrary and thus contrary to due process. See Nevada ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366, 368 (1947); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129, 1135 (1952); Pyle v. City of Shreveport, 215 La. 257, 40 So. 2d 235, 242 (1945); Texas ex rel. Walker v. City of Gladewater, 139 S.W.2d 283, 286 (Tex. Civ. App. 1940); Florida ex rel Davis v. City of Stuart, 97 Fla. 283, 120 So. 335, 345 (1929).

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> review of claims that Department of Justice violated due process in order not "to court the constitutional dangers inherent in denying a forum" in which to challenge department's actions).

Unlike the federal courts that have been able to construe federal statutes as permitting judicial review, this Court is unable here through statutory construction to avoid the constitutional question. This Court should thus follow the path of Ben Avon and hold that, by denying judicial review of constitutional challenges to state conduct, the North Carolina annexation statute is unconstitutional.

CONCLUSION

For the reasons stated, this Court should accept jurisdiction and schedule this appeal for plenary consideration.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert L. Deitz

GINSBURG, FELDMAN AND BRESS,
Chartered
1700 Pennsylvania Avenue, N.W
Washington, D.C. 20006
(202) 637-9000

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, N.C. 27106

Attorneys for Appellants

July 27, 1984

APPENDIX A

NORTH CAROLINA)	IN THE GENERAL COURT	
)	OF JUSTICE	
)	SUPERIOR COURT DIVISION	
FORSYTH COUNTY)	82 CVS 4481	
FORSYTH CITIZENS OPPOSING ANNEXATION, HENRY BREWER, ROBERT M. BURCHAM, PHILIP DEMARKO, JOY M. McNAB, GLADYS NORMAN, SAM POPE, JAMES A. SNEED, CORNELIUS F. SPACH, RAY W. SIZEMORE, and R. J. BALL, Plaintiffs,	)	
vs.	)	J U D G M E N T
CITY OF WINSTON-SALEM, a Municipal Corporation, and MAYOR WAYNE A. CORPENING, in his official Capacity, and VIVIAN H. BURKE, MARILYN S. HARPE, LARRY D. LITTLE, VIRGINIA K. NEWELL, ROBERT S. NORTH-INGTON, JR., ERNESTINE WILSON, LARRY W. WOMBLE and MARTHA S. WOOD, ALDERMEN, in their Official Capacities, Defendants.	)	

THIS CAUSE, an appeal pursuant to G.S. 160A-50, by Petitioners from two

areas subject to annexation ordinances adopted by the City of Winston-Salem on July 19, 1982, came on for hearing by the undersigned Judge, without jury, at the November 8, 1982, Civil Term of Forsyth Superior Court; and the Court, having heard the evidence and arguments of counsel, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. All parties are properly before the Court and the Court has jurisdiction over the parties and of the subject matter.

2. On May 17, 1982, the City of Winston-Salem Board of Aldermen adopted a resolution declaring its intent to annex three areas contiguous to the City's boundaries. The three areas are the Oldtown Area, designated Area A-1,

the Wilshire Area, designated Area E, and the Butterfield Area, designated Area H.

3. On May 17, 1982, the Board received and approved an annexation study (dated April 5, 1982) providing for the annexation of these three areas into the City. A copy of said report, designated Courts Exhibit No. 3 in the Record of this case, and a copy of the minutes of the Board's meetings related to this matter, designated Court Exhibit No. 4, were duly filed with the Court by the City with its Response to the Complaint in this case.

4. On June 21, 1982, after giving notice required by law, the Board held a public hearing on the proposed annexations. At said hearing the Board listened to and considered comments from

several persons opposing the proposed annexations, including some of the Plaintiffs in this lawsuit.

5. On July 6, 1982, after giving notice required by law, the Board adopted an ordinance annexing the Butterfield Area and gave first reading approval to the Oldtown and Wilshire Annexations. On July 19, 1982, the Board adopted by a 6-2 vote, the ordinance annexing the Oldtown and Wilshire areas.

6. Plaintiffs on August 18, 1982, initiated this proceeding by filing a petition with the Forsyth County Superior Court for judicial review of the Board's actions. The Defendants filed a response together with a copy of the report and minutes on August 26, 1982. Petitioners were promptly served with a copy of these documents.

7. None of the petitioners is a resident of Area H. The appeal filed in this case, while referencing Area H, was not filed within thirty days of the adoption of the annexation ordinance with respect to Area H, and no issues were raised at trial as to Area H.

8. As to the character of the two areas being annexed, both the Oldtown Area and the Wilshire Area meet the standards set out in G.S. 160A-48(b). Both areas are contiguous to the municipality's boundaries on more than one-eighth of each of their respective boundaries. No part of either area is included within the boundary of another municipality.

9. Area A-1 has a total resident population of 2.08 persons per acre and a total acreage of 1576.82 acres. It is

thus an area developed for urban purposes within the meaning of subsection 160A-48(c)(1).

10. The boundaries of Area A-1 follow topographical features wherever practical, property lines, and, where a street is used as a boundary, include within the area being annexed, land on both sides of the street as provided in G.S. 160A-48(e).

11. Area E-1, a portion of the Wilshire Area, has a total resident population of 1.71 persons per acre and 250.45 acres (68.77%) of the total acreage (364.18 acres) consist of lots and tracts five acres or less in size and 271 lots and tracts (90.33%) of the total number of lots and tracts (300) are one acre or less in size. Area E-1 is thus an area developed for urban

purposes within the meaning of G.S. 160A-48(c)(2).

12. Area E-2, a portion of the Wilshire Area, is adjacent on 82.7% of its external boundaries, to a combination of the City boundary and the boundary of the area developed for urban purposes (E-1). City services to urban Area E-1 will be provided with vehicles, utility lines, and other facilities traversing Area E-2. It is thus an area which constitutes a necessary land connection between the City and an area developed for urban purposes within the meaning of G.S. 160A-48(d)(2).

13. Area E-3, a portion of the Wilshire Area, is adjacent on 75% of its external boundaries to a combination of the City boundary and the boundary of an area developed for urban purposes (E-1).

City services to urban area E-3 will be provided with vehicles, utility lines, and other facilities traversing area E-2. It is thus an area which constitutes a necessary land connection between the City and an area developed for urban purposes within the meaning of G.S. 160A-48(d)(2).

14. With respect to water service, the Public Works staff of the City of Winston-Salem is the staff of both the City of Winston-Salem and the City/County Utility Commission. The Commission is appointed by the Board of Aldermen and the Board of County Commissioners, operates pursuant to a budget approved by the Board of Aldermen, operates through the use of water and sewer lines owned by the City, and operates pursuant to policies

approved by the Board of Aldermen. The Utility Commission has a policy (Court Exhibit 11) under which it will provide water and sewer service to newly annexed areas on the same basis and in the same manner as said services were being provided to the areas within the City of Winston-Salem prior to the annexation.

15. The operating expense to provide water service will be financed from utility service charges. Preparation of plans and specifications for the construction of the necessary major trunk water lines will begin as soon as annexation becomes effective and contracts for their construction will be let and construction will begin within twelve months following the effective date of annexation. The major lines necessary in order that water service

will be available within the annexed areas according to the policies in effect in the City for extending water lines to individual lots and subdivisions are shown on maps contained in the annexation report prepared by the City of Winston-Salem.

16. A major cost of construction of these trunk water lines will be financed by utility revenues and from state grants. If the state grants are not available, the net portion that was to be funded from state grants will also be funded from existing utility bonds or cash reserves of the water fund. The water fund reserves exceed the costs of such lines several times over.

17. City sewer service, as within the present City limits, will be provided to the annexed territory in

accordance with policies which have been or may hereafter be adopted by the City/County Utility Commission to be applicable within the existing City limits and the annexed areas including the policy contained in the resolution designated Court Exhibit No. 11 in this proceeding. The operating expenses to be provided sewer service will be financed from utility service charges.

18. Preparation of plans and specifications for the construction of major sewer outfalls, as shown in the annexation report (designated Court Exhibit No. 3), will begin as soon as annexation becomes effective and contracts for these major facilities will be let and construction will begin within twelve months of the official date of annexation. Upon completion of

these lines, property owners from the annexed areas will be able to secure sewer service according to policies in effect within the City for extending sewer lines to individual lots and subdivisions.

19. The cost of construction of major outfall sewers and interceptor sewers within the annexed area will be financed through a bond issue and through state grant funds. In the event state grants are not approved, existing revenues of either bonds or cash reserves will be used to finance construction costs. The present reserves exceed the cost of such major sewers several times over.

20. With respect to police protection, at the present time there are 316 sworn officer positions in the City of

Winston-Salem serving a current population of 139,478. This provides 2.26 officers per 1,000 population. Upon the annexation of the Oldtown and Wilshire areas the City will provide eight additional officers in order to maintain a ratio of 2.26 officers per 1,000 population. Plans are under way to establish communications facilities within the Oldtown area and the area adjacent to the Wilshire area in order to improve public safety communications in these two areas. An additional public safety vehicle will be added to the fleet to provide additional police protection services. On the effective date of annexation, the City will provide police protection services to the annexed areas on substantially the same basis and in the same manner as

such services are provided within the rest of the municipality prior to annexation.

21. With respect to fire protection:

Area A-1 will be served primarily by existing Engine Company 8 located at 2417 Reynolda Road in a new station designated Engine Company 14, to be located in the 5700 block of Shattalon Drive. Station No. 14 has a completion date of July 1, 1983. Personnel for this station are employed and trained or receiving training at this time. Pending the completion of Fire Station No. 14, parts of the Area A-1 have as their nearest existing fire station, Station No. 9. The response times to the fire demand zones within Area A-1 from existing fire stations and Fire Station

No. 14 are comparable to fire zones within the present City limits.

22. There are some areas within the City which have worse response times than those in the areas proposed for annexation.

23. With respect to the Wilshire Area, this area will be served from existing Fire Station No. 5. The response times from Fire Station No. 5 to the fire demand zone in the Wilshire Areas are comparable to those within the present City limits.

24. During the period January to September, 1982, Engine Company No. 5, which will serve the Wilshire Area, was fighting fires or in training a total of 4.7% of their time and thus would be available to respond to a fire in the Wilshire Area the remaining percentage of their time.

25. Engine Company No. 8, which will serve much of the Oldtown Area, was in training, fighting fires and therefore unavailable for duty 4% of the time between the period January to September, 1982. All other times they would be available for any fire call in the Oldtown area. On the effective date of annexation, the City of Winston-Salem will be able to provide fire protection services to the newly annexed areas on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

26. Provision of bus service by the Winston-Salem Transit Authority is not affected by the location of the municipality's City limits. After reviewing potential for riders, the

possibility for route continuity, no changes in service are warranted for the proposed annexed areas at this time. In the Oldtown Area, the Winston-Salem Transit Authority operates express bus services from the Oldtown Shopping Center to the downtown area with two morning and two evening trips. No bus service, either express or fixed route is provided in the Wilshire Area.

27. With respect to street maintenance services, there are approximately .75 miles of dirt streets within the Wilshire and Oldtown annexed areas. These dirt streets will be maintained in the same manner as the dirt streets within the existing City limits. They will be eligible for pavement in accordance with the same policies and procedures as are dirt streets within the

existing City limits. Paved streets within the two annexed areas will be maintained in accordance with the policies of the City related to paved street maintenance. On the date of annexation, street maintenance services will be provided in the Wilshire and Oldtown annexation areas on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. Maintenance of the paved streets will be accomplished utilizing the existing equipment and Streets Division personnel.

28. With respect to recreation services, residents of the Oldtown and Wilshire areas currently may use all city parks, playgrounds, swimming pools and other recreation facilities. Some

of these facilities charge non-City residents higher rates than those fees charged to City residents. Upon annexation, residents of the Oldtown and Wilshire areas will pay the lower fees charged to City residents. All of the recreation facilities within the City of Winston-Salem will be available to provide recreation facilities to residents of the annexed areas. There are some areas within the existing limits of the City of Winston-Salem which are further from City recreational facilities than are areas within the Oldtown and Wilshire areas. The City will be able to provide recreational services to the annexed areas on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

29. With respect to garbage collection services, residential refuse will be collected within the annexed areas from residents' backyards once every three working days. To accomplish this, one rear-loading refuse truck will be purchased and one medium equipment operator and two laborer positions will be added to the Sanitation Division. The rear-loading refuse truck will be financed from current year revenues of the General Fund. Commercial refuse in the annexed areas will be collected according to the same schedule in effect and according to the same fee schedule as exists in the present City limits. This will be accomplished utilizing existing equipment and personnel. On the date of annexation, garbage collection services will be provided to

the annexed areas on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

30. As shown in the annexation report, submitted as Court Exhibit 3, all other municipal services, including street cleaning, street lighting, street markers, traffic control and aldermanic representation will be provided to the residents of the annexed areas on substantially the same basis and in the same manner as services are provided in the rest of the municipality prior to annexation.

CONCLUSIONS OF LAW.

Based on the above findings of fact, the Court makes the following conclusions of law:

A. The annexation ordinances are valid on their face and the burden of proof is on the petitioners to show their invalidity. The petitions have failed to carry that burden.

B. North Carolina General Statutes, Chapter 160A, Article 4A, Part 3, are constitutional and are constitutional as applied by the City of Winston-Salem in the annexation of the two areas listed above. The procedure followed by the City of Winston-Salem in annexing the five areas complies with the requirements of G.S. 160A-49.

C. The provisions of G.S. 160A-48, regarding the character of the areas to

be annexed, have been met. Area A-1 qualifies under the provisions of G.S. 160A-48(b) and (c)(1). Area E qualifies under the provisions of G.S. 160A-48(b). In addition, Area E-1 qualifies under the provisions of G.S. 160A-48(c)(2). Areas E-2 and E-3 qualify under the provisions of G.S. 160A-48(d)(2).

D. The City of Winston-Salem will be able to provide upon the date of annexation all major municipal services to the areas annexed on substantially the same basis and in the same manner as such services are provided in the rest of the municipality prior to annexation.

E. The City of Winston-Salem has met the requirements of G.S. 160A-47, 160A-48 and 160A-49.

F. No appeal was taken with respect to the annexation of Area D and,

thus the annexation of Area H should be effective on the date as approved by the Board of Aldermen, June 30, 1983.

Based upon the above findings of fact and conclusions of law, the Court adjudges and decrees that the annexation ordinances adopted by the City of Winston-Salem on July 19, 1982, are valid and in conformity with the laws of North Carolina. The Plaintiffs have come forward with no evidence showing that proper procedures were not followed. Plaintiffs' evidence shows that the City of Winston-Salem can render services required by the annexation statutes on the date of annexation and that the areas qualify for annexation under the terms of the statute.

WHEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss pursuant

to N.C. Rules of Civil Procedure 41(b) is hereby granted at the close of Plaintiffs' case, and it is further ordered and decreed that annexation ordinances adopted by the City of Winston-Salem on July 19, 1982, are valid and in conformity with the laws of North Carolina.

This the 12th day of November, 1982.

/s/ William Z. Wood
Judge Presiding

APPENDIX B

NO. 8321SC213
NORTH CAROLINA COURT OF APPEALS
Filed: 6 March 1984

FORSYTH CITIZENS OPPOSING ANNEXATION, HENRY BREWER, ROBERT M. BURCHAM, PHILIP DEMARKO, JOY M. MCNAB, GLADYS NORMAN, SAM POPE, JAMES A. SNEED, CORNELIUS F. SPACH, RAY W. SIZEMORE and R. J. BALL

v. Forsyth County

No. 82CVS4481

CITY OF WINSTON-SALEM, a Municipal Corporation, and MAYOR WAYNE A. CORPENING, in his Official Capacity, and VIVIAN H. BURKE, MARILYN S. HARPE, LARRY D. LITTLE, VIRGINIA K. NEWELL, ROBERT S. NORTHINGTON, JR., ERNESTINE WILSON, LARRY W. WOMBLE and MARTHA S. WOOD, ALDERMEN, in their Official Capacities

Appeal by petitioners from Wood (William Z.), Judge. Judgment entered 12 November 1982 in Superior Court, Forsyth County. Heard in the Court of Appeals 6 February 1984.

Petitioners appeal from a judgment of the Forsyth County Superior Court dismissing their petition challenging the actions of the Winston-Salem Board of Aldermen in adopting ordinances annexing two areas to the City of Winston-Salem. In its judgment, the court concluded that North Carolina's annexation statutes contained in G.S. Chapter 160A, art. 4A, part 3 are constitutional and were constitutionally applied in this case, and that the City of Winston-Salem met the requirements of G.S. 160A-47, 160A-48, and 160A-49 in annexing the areas. Petitioners appealed.

Rosbon D. B. Whedbee for petitioner appellants.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr.; and City

of Winston-Salem Attorney's Office, by Ronald G. Seeber and Ralph D. Karpinos, for respondent appellees.

WEBB, Judge.

The question presented by this appeal is whether North Carolina's annexation statutes are constitutional and were constitutionally applied in this case. Petitioners contend that (1) G.S. Chapter 160A, art. 4A, part 3 violates the due process clause of the Fourteenth Amendment to the United States Constitution because it prohibits judicial review of the conduct of municipal officials in annexation proceedings alleged to be arbitrary, capricious, unreasonable or abusive, and (2) that the annexation involved herein is arbitrary, capricious, unreasonable, and an abuse of discretion by the City

in violation of the due process clause of the Fourteenth Amendment.

G.S. 160A-50(f) provides that a court, in reviewing annexation proceedings, may take evidence intended to show either that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of either G.S. 160A-47 or 160A-48 were not met. The statutory procedure outlined in G.S. 160A-49 requires notice of a public hearing and sets out guidelines for the hearing which is to be held prior to annexation. G.S. 160A-47 requires the annexing city to prepare maps and plans for the services to be provided to the annexed areas. G.S. 160A-48 sets out guidelines for the character of the area to be annexed.

The North Carolina Supreme Court and the Fourth Circuit Court of Appeals have made it clear that G.S. 160A-50(f) limits the scope of judicial review to the determination of whether the annexation proceedings substantially comply with the requirements of the statutes referred to in G.S. 160A-50(f). See In re Annexation Ordinance, 284 N.C. 442, 202 S.E. 2d 143 (1974); Food Town v. City of Salisbury, 300 N.C. 21, 265 S.E. 2d 123 (1980); Raintree Homeowners Assoc. v. City of Charlotte, 543 F. Supp. 625 (W.D.N.C. 1982), aff'd, 710 F. 2d 132 (4th Cir. 1983). A separate test of the reasonableness of an annexation is not included within the limited scope of judicial review, see In re Annexation Ordinance, 303 N.C. 220, 230, 278 S.E. 2d 224, 231 (1981);

however, G.S. 160A-50(f) and the provisions incorporated therein amount to a requirement that the courts determine whether an annexation is reasonable. See Raintree Homeowners, supra at 629. In Raintree, the Court stated that even though the language of the statute does not speak in terms of arbitrariness, capriciousness or unreasonableness the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by a municipality. Id.

Assuming, arguendo, that the annexation involved herein is subject to review under the Fourteenth Amendment to the United States Constitution, we find that the protection afforded by the North Carolina statutes is sufficient to comport with due process. Our Supreme

Court and the Fourth Circuit Court of Appeals have repeatedly upheld our annexation statutes against constitutional attack and we find nothing in this case convincing us to hold differently. Furthermore, petitioners have not argued on appeal that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of G.S. 160A-47 and 160A-48 were not met; therefore, they have failed to show that the annexation statutes were unconstitutionally applied in this case.

More importantly, it appears petitioners' challenge must fail because it is not actionable under the Fourteenth Amendment. The Fourth Circuit Court of Appeals rejected these same arguments presented by petitioners with respect to the annexations concerned herein,

holding that petitioners' allegations, even if true, do not entitle them to relief under the Fourteenth Amendment. See Baldwin, et al. v. City of Winston-Salem, 710 F. 2d 132 (4th Cir. 1983). Relying on the cases of Hunter v. Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907) and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), the Court stated that "the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications." Id. at 135.

In Hunter v. Pittsburgh, supra, the seminal case in this area, the Supreme

Court declared that annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislature to regulate. Thus, by Hunter, the Supreme Court made it clear that a state's discretion in determining its annexation policies is beyond the reach of the Fourteenth Amendment. However, subsequent decisions have indicated that municipal annexations are subject to review under the Fourteenth Amendment if the challenge to an annexation is based upon allegations of racial discrimination or infringement of voting rights. See Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110 (1960); Hayward v. Clay, 573 F. 2d 187 (4th Cir. 1978), cert. denied, 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed. 2d 351 (1978). But

these are the only recognized exceptions to the general rule that annexations are to be accorded considerable deference. See Berry v. Bourne, supra; Baldwin v. City of Winston-Salem, supra.

Because the petitioners' challenge does not concern racial discrimination, voting rights, or other suspect classification or infringement of fundamental rights, the Fourth Circuit concluded that petitioners had not stated a claim entitling them to relief under the due process clause of the Fourteenth Amendment. In accordance with the Fourth Circuit's decision in Baldwin, supra, and the decisions cited therein, we hold the superior court did not err in dismissing petitioners' action.

Next, petitioners contend that North Carolina's annexation statutes are unconstitutional because they only permit owners of real property to challenge annexations. Three of the petitioners do not own real property in either of the annexed areas yet they were permitted to challenge the annexations without objection by the respondents. We do not believe it is necessary for us to pass on the question of whether the annexation statutes unconstitutionally deny personal property owners the right to challenge annexations because in this case such persons were in fact permitted to proceed with their challenge. The judgment of the superior court is

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

APPENDIX C

No. 147P84 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

FORSYTH CITIZENS OPPOSING ANNEXATION, et al v. CITY OF WINSTON-SALEM, a municipal corporation, et al	)	JUDGMENT DISMISSING APPEAL ON MOTION OF DEFENDANT AND DENYING PETITION FOR DISCRETIONARY REVIEW (8321SC213)

****

Upon consideration of the Plaintiffs' notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Defendant's motion to dismiss the appeal for lack of substantial constitutional question and upon

consideration of the Plaintiffs' petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Defendant's motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 30th day of April 1984.
>
> s/Frye, Jr. For the Court"

Plaintiffs' petition for discretionary review is

> "Denied by order of the Court in conference, this the 30th day of April 1984.
>
> s/Frye, Jr. For the Court"

Accordingly, the temporary stay entered by this Court in this

matter on 26 March 1984 is hereby dissolved.

Therefore, it is considered and adjudged further that Plaintiffs do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of May 1984.

_____
J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals Mr. Rosbon D. B. Whedbee, Attorney at Law Womble, Carlyle, Sandridge and Rice, Attorneys at Law Ralph D. Karpinos, Assistant City Attorney

APPENDIX D

NO. 8321SC213 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

FORSYTH CITIZENS OPPOSING ANNEXATION, HENRY BREWER, ROBERT M. BURCHAM, PHILIP DEMARKO, JOY M. MCNAB, GLADYS NORMAN, SAM POPE, JAMES A. SNEED, CORNELIUS F. SPACH, RAY W. SIZEMORE and R. J. BALL, Plaintiffs-Appellants,	)	
v.	)	Forsyth County No. 82-CVS4481
CITY OF WINSTON-SALEM, A Municipal Corporation, and MAYOR WAYNE A. CORPENING, in his Official Capacity, and VIVIAN H. BURKE, MARILYN S. HARPE, LARRY D. LITTLE, VIRGINIA K. NEWELL, ROBERT S. NORTHINGTON, JR., ERNESTINE WILSON, LARRY W. WOMBLE and MARTHA S. WOOD, ALDERMEN, in their Official Capacities, Defendants-Appellees.	)	

FILED
1984 Jul.25 AM 11:55
IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

NOTICE OF APPEAL

Plaintiffs-Appellants Henry Brewer, Robert M. Burcham, Philip DeMarko, Joy M. McNab, Gladys Norman, Sam Pope, James Sneed, Cornelius F. Spach, Ray W. Sizemore, and John J. Gillespie hereby give NOTICE OF APPEAL to the United States Supreme Court from the judgment rendered by the North Carolina Court of Appeals on March 6, 1984, in the above-captioned case. (The North Carolina Supreme Court denied discretionary review on May 1, 1984.) The decision rendered by the North Carolina Court of Appeals is repugnant to the Fourteenth Amendment to the United States Constitution. The appeal to the United States Supreme Court is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted, this the 24th day of July, 1984.

/s/
ROSBON D.B. WHEDBEE

P.O. Box 147
Ahoskie, N.C. 27910
Tel. (919) 332-5927

Attorney for Plaintiffs-
Appellants Brewer, et al.

APPENDIX E

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

§ 160A-50. Appeal. -- (a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within

five days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-47.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been

met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within three

months from receipt of such instructions, the annexation proceeding shall be deemed null and void.

(h) Any party to the review proceedings, including the municipality, may appeal to the Supreme Court from the final judgment of the superior court under rules of procedure applicable in other civil cases. The appealing party may apply to the superior court for a stay in its final determination, or a stay of the annexation ordinance, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court; provided, that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated

into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior or Supreme Court, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. (1959, c. 1009, s. 6; 1973, c. 426, s. 74.)

APPENDIX G

NORTH CAROLINA)	IN THE GENERAL COURT	
)	OF JUSTICE	
)	SUPERIOR COURT DIVISION	
FORSYTH COUNTY)	82 CVS 4481	
FORSYTH CITIZENS OPPOSING ANNEXATION, HENRY BREWER, ROBERT M. BURCHAM, PHILIP DEMARKO, JOY M. MCNAB, NORMAN, SAM POPE, JAMES A. SNEED, CORNELIUS F. SPACH, RAY W. SIZEMORE and R. J. BALL,	)	
Plaintiffs,	)	
vs.	)	MOTION IN LIMIN
CITY OF WINSTON-SALEM, a Municipal Corporation, and MAYOR WAYNE A. CORPENING, in his Official Capacity, Capacity, and VIVIAN H. BURKE, MARILYN S. HARPE, LARRY D. LITTLE, VIRGINIA K. NEWELL, ROBERT S. NORTHINGTON, JR., ERNESTINE WILSON, LARRY W. WOMBLE and MARTHA S. WOOD, ALDERMEN, in their Official Capacities,	)	
Defendants.	)	

COME NOW the Defendants, by

and through their undersigned counsel, and move the court for an order determining that certain matters alleged in the complaint are (even if they were true) irrelevant and that no evidence will be reviewed with respect to them.

Defendants would respectfully show the court:

1. That according to the Petition and Answers to Defendants' Interrogatories filed in this proceeding, Defendants believe that the Plaintiffs will attempt to introduce evidence on several matters which are completely irrelevant and immaterial to the only subjects authorized for this court to consider in an appeal under G.S. 160A-50;

2. That to allow introduction of such matters at hearing would prolong the trial, serve no legitimate purpose under the statutes, and defeat the intent of G.S. 160A-50;

3. That G.S. 160A-50(a) and (f) set out the matters this court is permitted to consider at this proceeding;

4. That G.S. 160A-50(a) and (f) provide:

(a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in

this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) The court shall fix the date of review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

5. That among the particular matters alleged by Plaintiffs in their complaint which are clearly irrelevant and immaterial to this proceeding are:

a. Motives and reasons for the Board of Aldermen's decision to annex certain areas;

b. Motives and reasons for the Board of Aldermen's decision not to annex certain other areas;

c. Quality of the services being provided within the existing corporate limits of the City of Winston-Salem, and quality of the services being provided to unincorporated areas surrounding the City of Winston-Salem;

d. Matters relating to the services being provided or damages allegedly being caused to anyone other than the individually named Plaintiffs in this proceeding.

6. That these statutes and related case law clearly establish that any evidence re matters other than those

set out in the statute are irrelevant and immaterial and should be excluded from the proceeding. The Supreme Court of North Carolina stated in In Re: Annexation Ordinance, 278 N.C. 641, 180 S.E.2d. 851 (1971):

> The scope of judicial review of annexation proceedings, however, is limited by statute.
>
> The jurisdiction of Superior Court on Appeal from an annexation ordinance is defined in G.S. 160-453.18. Within thirty days after the passage of an annexation ordinance, the statute authorizes any person owning property in the annexed territory who believes "that he will suffer

material injury by reason of the failure of the municipal governing body to comply with the procedures set forth in this part (Part 3 of N.C. Gen Stats., 160) or to meet the requirements set forth in Section 160-453.16 as they apply to his property" to petition the Superior Court to review the action of the governing board. Thus, the Court's review is limited to these inquiries:

1. Did the municipality comply with the statutory procedure?

2. If not, will petitioners "suffer material injury" by reason of the municipality's failure to comply?

3. Does the character of the area specified for annexation meet the requirements of G.S. 160-453.16 as applied to petitioners' property? . . .

Id. at 646-47, 180 S.E.2d at 855 (G.S. Sections 160-453.13 to 160-453.24 have been recodified as G.S. Sections 160A-45 to 160A-56).

See also In Re: Annexation Ordinance (Winston-Salem) 303 N.C. 220, 278 S.E.2d 224 (1981); Moody v. Town of Carboro, 301 N.C. 318, 271 S.E.2d 265 (1980).

WHEREFORE, Defendants pray that the court enter a protective order directing that no evidence unrelated to the matters set out in the statute may be offered as evidence at the hearing.

This the 2nd day of November, 1982.

Of Counsel:
Womble, Carlyle, Sandridge & Rice

Roddey M. Ligon, Jr.

2400 Wachovia Building
Post Office Drawer 84
Winston-Salem, N.C. 27102
Telephone: 919/721-3619

Ronald G. Seeber

City Attorney's Office
115 City Hall
Post Office Box 2511
Winston-Salem, N.C. 27102
Telephone: 919/727-2056

Ralph D. Karpinos

Attorneys for Defendants

(2)

84-152

NO.

Office-Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HENRY BREWER, et al.

v.

CITY OF WINSTON-SALEM, N.C., et al.

On Appeal From the North Carolina Court of Appeals

MOTION TO DISMISS OR AFFIRM

Roddey M. Ligon, Jr.
Counsel of Record

WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Drawer 84
Winston-Salem, NC 27103
(919) 721-3600

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

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Ronald G. Seeber
Ralph D. Karpinos
City Attorney's Office
115 City Hall
Winston-Salem, NC 27101
(919) 727-2056

Attorneys for Appellees

August 20, 1984

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. STATEMENT OF THE CASE.....	2
II. SUMMARY OF ARGUMENT.....	4
III. REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS.....	7
A. Applicable Supreme Court Decisions.....	7
B. The Decision of the North Carolina Court of Appeals Is Consistent With the Law of the Supreme Court.....	17
C. The North Carolina Appellate Court Do Review Annexations to Determine Reasonableness and Compliance With Due Process as Well as Other Constitutional Standards.....	20
IV. CONCLUSION.....	29
APPENDICES	
Appendix A.....	1a
Appendix B.....	1b
CERTIFICATE OF SERVICE.....	31

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Dunn, 6 Wheat 204, 226 (1821)	15
Baldwin v. City of Winston-Salem, 710 F.2d 132, cert. denied 104 S.Ct. 536 (1983)	4, 5, 17, 18
Citizens Committed to Oppose Annexation v. City of Lynchburg, 528 F.2d 816 (4th Cir.), application denied 423 U.S. 1043 (1976	18
Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., 67 N.C.App. 165, 312 S.E.2d 517 pet. denied ____ N.C. ____, 315 S.E.2d 701 (1984)	1, 3, 6, 17, 19, 24, 28
Garren v. City of Winston-Salem, 463 F.2d 54 (4th Cir.), cert. denied 408 U.S. 1039 (1972)	18
Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967	27
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	6, 10 11, 12, 17, 19
Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980)	27

Cases:	Page
Hayward v. Clay, 573 F.2d 184 (4th Cir.) cert. denied 439 U.S. 959 (1978)	19
Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978)	6, 13, 14, 16, 17
Hunter v. Pittsburgh, 207 U.S. 161 (1907)	2, 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19
In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d (1981)	2
In Re Annexation Ordinance Adopted by the City of Charlotte, 284 N.C. 442, 452 202 S.E.2d 143, 149 (1974)	28
In Re Annexation Ordinance No. 866, 253 N.C. 637, 640-41, 117 S.E.2d 795, 798 (1961)	21
In Re Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981)	24-25
In re Durham Annexation Ordinance, 66 N.C.App. 473, 311 S.E.2d 898 (1984)	28-20

Cases:	Page
In Re Ordinance of Annexation 1977-4, 296 N.C. 1, 19, 249 S.E.2d 698, 708 (1978)	27
Moody v. Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980)	23, 27
Raintree Homeowners Assoc. v. City of Charlotte, 543 F.Supp. 625 (W.D.N.C. 1982), aff'd. 710 F.2d 132 (4th Cir.) cert. denied, 104 S.Ct. 536 (1983)	2, 18, 24
Reynolds v. Sims, 337 U.S. 533, 575 (1964)	15
Sailors v. Board of Education, 387 U.S. at 108 (1967)	15
Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980)	27
Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972)	19

MOTION TO DISMISS OR AFFIRM

Appellees are the City of Winston-Salem, North Carolina, and its Mayor and members of its governing board. Pursuant to Rule 16 of the Supreme Court Rules, Appellees move the Court to dismiss the appeal seeking review of the decision of the North Carolina Court of Appeals in the case of Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., 67 N.C.App. 165, 312 S.E. 2d 517, pet. denied, _____ N.C. _____, 315 S.E.2d 701 (1984) [which is referred to by Appellants in their Jurisdictional Statement as Brewer, et al. v. City of Winston-Salem] on the ground that said appeal does not present a substantial federal question. In the alternative, Appellees respectfully move the Supreme Court of the United States to summarily

affirm the decision of the North Carolina Court of Appeals on the basis that the decision of the North Carolina Court is in accord with constitutional principles and requirements. In support hereof, Appellees respectfully submit the following statement of the case and argument.

I. STATEMENT OF THE CASE

Appellants ask the Supreme Court of the United States to accept jurisdiction of a decision of the North Carolina Court of Appeals. Relying on Hunter v. Pittsburgh, 207 U.S. 161 (1907), Raintree Homeowners Assoc. v. City of Charlotte, 543 F.Supp. 625 (W.D.N.C. 1982), aff'd, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983), and In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981) and applicable North Carolina statutes, the North Carolina Court of

Appeals upheld the trial court's decision that North Carolina's annexation laws and Appellees' actions thereunder were constitutionally sound. Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, et al., 67 N.C.App. 165, 312 S.E.2d 517, pet. denied, _____ N.C. _____, 315 S.E.2d 701 (1984). The Supreme Court of North Carolina dismissed the appeal and denied Appellants' petition for discretionary review.

Notice of appeal to the Supreme Court of the United States was given on July 24, 1984 and Appellants submitted their Jurisdictional Statement on July 27, 1984. Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellees submit this motion to dismiss the appeal or affirm the decision of the North Carolina Court of Appeals.

II. SUMMARY OF ARGUMENT

At the outset Appellees ask this Court to take note that this is the second time these Appellants have asked the Supreme Court of the United States to consider this case. Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983) involved challenges to four annexations in the Cities of Winston-Salem and Charlotte, North Carolina. One of the four cases, Brewer v. City of Winston-Salem, was a challenge to the same annexation as this case. The unreported decision of Erwin, J., United States District Court Judge for the Middle District of North Carolina dismissing that case is set forth in Appendix A. The four cases were consolidated in a per curiam decision by the United States Court of Appeals for the Fourth Circuit and this Court on December 5, 1983,

denied the petition for writ of certiorari. The questions presented in that petition for writ of certiorari are set forth as Appendix B and demonstrate that the issues raised in Appellants' Jurisdictional Statement are virtually the same as in the Baldwin case. The briefs submitted by Appellants then, and now, are substantially the same.

The annexation involved in this appeal went into effect on May 1, 1984. Thus, the residents of the annexed areas have been receiving City services since that date, and have been subject to City taxation since that date.

The decision of the North Carolina Court of Appeals is consistent with the decisions of the Supreme Court of the United States interpreting the Fourteenth Amendment as it applies to annexations.

No substantial federal question therefore exists and this appeal should be dismissed. North Carolina's annexation statutes, and in particular N.C.G.S. 160A-50(f), give substantial protection against arbitrary, capricious and unreasonable acts by a municipality. Protections afforded by North Carolina's statutes comport with due process. The provisions of 160A-50(f) and the statutes incorporated therein amount to a requirement that North Carolina Courts determine whether an annexation is reasonable. Forsyth Citizens, supra, at 166, 312 S.E.2d at 518. The decision of the North Carolina Court of Appeals is consistent not only with Hunter, but also with the subsequent cases of Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978).

Contrary to Appellants' allegations, the scope of judicial review of annexations in North Carolina is not limited. Case law makes it abundantly clear that the North Carolina courts will review and decide the constitutionality of annexations and the annexation statutes.

III. REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS

A. Applicable Supreme Court Decisions.

The law applicable to this case is clearly set out by the United States Supreme Court in the case of Hunter v. Pittsburgh, supra. Hunter questioned the validity of an annexation based upon a Pennsylvania statute which permitted a larger municipality to annex a smaller one despite the fact that a majority of the citizens of this smaller municipal corporation desired not to be

annexed. The plaintiffs in Hunter challenged the annexation on a number of grounds, including due process grounds similar to those raised in this case. Hunter at 168-169.

This Court upheld the annexation with the following governing principles:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting

them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the

> state, and those who legislate for the states are alone responsible for any unjust or oppressive exercise of it. Id. at 178-79.

Thus, in Hunter, this Court made it absolutely clear that the extension of municipal boundaries was a matter governed by state rather than federal law.

Appellants have gone to great lengths in an effort to create the illusion that the legal principles supporting Hunter have been eroded and that Hunter should have "little continuing precedential force." (Jurisdictional Statement, p. 30) Their theory as to Hunter's demise is contradicted by two recent decisions of this Court reaffirming Hunter.

In Gomillion v. Lightfoot, supra, this Court affirmed the basic principles of Hunter. While the Supreme Court originally decided to hear that case in order to

consider issues under both the Fourteenth and Fifteenth Amendments, its decision was based solely upon the Fifteenth Amendment (voting rights denied on the basis of race). In doing so, the Gomillion Court expressly held:

> Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibition of the Constitution considered in those cases. 364 U.S. at 344 (emphasis added).

Gomillion expressly recognizes Hunter to be good law. Gomillion expressly recognizes that Hunter holds that the Fourteenth Amendment's Due Process Clause does not apply to annexations by municipal corporations and re-affirms that holding. The proposition bears restatement: Gomillion expressly

affirms Hunter's holding that a state's authority to modify the boundaries of its political subdivisions is "unrestrained" by the Fourteenth Amendment's Due Process Clause.

The Gomillion opinion makes it clear that its decision in reference to the Fifteenth Amendment does not alter the Hunter decision as to the application of the Fourteenth Amendment—". . .[I]f one principle clearly emerges from the numerous decision of this Court dealing with taxation, it is that the Due Process Clause affords no immunity against mere inequalities in tax burden, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political power." Id. at 343. "When a State exercises power wholly within the domain of state

interest, it is insulated from federal judicial review." Id. at 347.

The constitutional principles established by Hunter were most recently reaffirmed by this Court in Holt Civic Club v. City of Tuscaloosa, supra. While Appellants have quoted one statement from Holt out of context suggesting that Hunter has been "qualified by later cases" (Jurisdictional Statement. p. 38), they fail to recognize that Holt represents a strong affirmation of the underlying principle that the circumstances presented by this case raise no issue of Fourteenth Amendment due process rights.

In Holt, the plaintiff organization challenged a state statute authorizing municipalities to exercise certain powers over persons and property within three miles of their city limits. Persons

residing within the affected extra-territorial area could not vote for the city's elected officials. The Supreme Court dismissed the challenge to the state statute on the grounds that it lacked substantive merit as it "alleged no claim cognizable under the United States Constitution." Id. at 66.

In reaching its determination in Holt, this Court held that persons within the extraterritorial area did not have the constitutional right to vote on municipal policies affecting the persons and property within the subject area. Id. at 69-70. "Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a

legitimate state purpose." Id. at 70.

In this regard, the Court noted the following:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' Anderson v. Dunn, 6 Wheat 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them'. Hunter v. Pittsburgh, 207 U.S. 161, 178. See also, e.g., Sailors v. Board of Education, 387 U.S. at 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964). In Hunter v. Pittsburgh, the Court discussed at length the relationship between a State and its political subdivisions, remarking: 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the

> State.' Ibid. While the broad statements as to state control over municipal corporations contained in Hunter have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist., supra, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them. Holt at 71 (footnote omitted).

Thus, it is clear that Hunter is alive and well, and is still the governing law as to the questions involved in this case.

This Court concluded "that Alabama's police jurisdiction statutes violate neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment." Id. at 75. Obviously, the same holding is appropriate in this case. As in Holt, the state statute challenged by Appellants is a reasonable exercise of

North Carolina's power to provide for municipal government. Therefore, pursuant to Hunter and Holt, the statute is not subject to this constitutional challenge.

B. The Decision of the North Carolina Court of Appeals Is Consistent With the Law of the Superme Court.

The decision of the North Carolina Court in this case, Forsyth Citizens Opposing Annexation v. City of Winston-Salem, follows the principles of Hunter, Gomillion, and Holt Civic Club and thus no federal question exists. Further, the decision involves the one of the same annexations and the same issues involved in Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 536 (1983). The Fourth Circuit in Baldwin determinted that the Fourteenth Amendment is not violated where, the "proposed annexation does not impinge on fundamental rights or create suspect classifications." Indeed, the

Fourth Circuit's conclusion in this regard was based on the fact that the allegations of the plaintiffs in Baldwin, even if true, did not raise a colorable claim under the Fourteenth Amendment. Baldwin at 135. As the Fourth Circuit pointed out, the exceptions to Hunter which have been recognized by the United States Supreme Court in Gomillion and Holt have not been all alleged in this case. "No suspect classification or fundamental right is therefore implicated and the ordinances thus do not abridge the Fourteenth Amendment to the United States Constitution." Baldwin at 135. See Raintree, 543 F.Supp. 625. See Brewer (Appendix A). See also Citizens Committed to Oppose Annexation v. City of Lynchburg, 528 F.2d 816 (4th Cir.), application denied 423 U.S. 1043 (1976); Garren v. City of Winston-Salem, 463 F.2d

54 (4th Cir.), cert. denied 408 U.S. 1039 (1972); Thompson v. Whitley, 344 F.Supp. 480 (E.D.N.C. 1972)(three-judge district court).

The North Carolina Court of Appeals followed these principles in Forsyth Citizens Opposing Annexation. N.C.G.S. 160A-50(f) and the provisions incorporated therein, the Court said, "amount to a requirement that the courts determine whether an annexation is reasonable." Id. at 166. 312 S.E.2d at 518. Statutory appeal procedures comport with due process and none of the allegations in Gomillion or Hayward v. Clay, 573 F.2d 187 (4th Cir.), cert. denied 439 U.S. 959 (1978), were involved. Following this Court's decision in Hunter, the North Carolina Court of Appeals thus properly affirmed the trial court's judgment upholding the

annexation.

C. The North Carolina Appellate Courts Do Review Annexations to Determine Reasonableness and Compliance With Due Process as Well as Other Constitutional Standards.

Appellants' request for review by this Court is also based on their assertion that under North Carolina law judicial review of annexations is limited and that the North Carolina Appellate Courts will not review the constitutionality or reasonableness of municipal annexations. (Jurisdictional Statement, pp. 40-48). The Appellants are simply incorrect with reference to this basic premise. It is very clear from the decisions of the North Carolina Supreme Court and Court of Appeals that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Appellants.

The first decision concerning the constitutionality of the annexation statutes at issue in this case considered all manner of constitutional questions, including whether those statutes violated due process of law under the Fourteenth Amendment of the United States Constitution. In Re Annexation Ordinance No. 866, 253 N.C. 637, 640-41, 117 S.E.2d 795, 798 (1961). In this seminal decision, it was held that the procedures provided by the statutes are substantial ones which protect the rights of newly-annexed citizens:

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of

> such boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all of the governmental services to the newly annexed area or areas; comparable to the services provided for the residents within the city prior to annexation of the new area or areas. 253 N.C. at 647, 117 S.E.2d at 802.

In view of its judicial review of and interpretation of the statutes, the North Carolina Supreme Court held that they were not in violation of due process.

> The petitioners contend that by reason of these annexations in the manner in which they have been brought about, they have been deprived of their liberty and property without due process of law, in violation of Article I, Section 17 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The record in these proceedings does not support the petitioners'

> contention in this respect. Certainly it would seem that they do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions. 253 N.C. at 651-52, 117 S.E.2d at 805.

With respect to whether or not the North Carolina court will review "reasonableness", the North Carolina Supreme Court said in Moody v. Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980): "The review (of annexations) is afforded pursuant to G.S. 160A-50 and serves as a safeguard against unreasonable and arbitrary action by the annexing municipality." The principle that compliance with a constitutional statute establishes

constitutional reasonableness was recognized by Judge McMillan in Raintree Homeowners Association v. City of Charlotte:

> N.C.G.S. 160A-50(f) and the provisions incorporated therein, amount to a requirement that the Supeior Court determine whether an annexation is reasonable. The language of the provisions does not speak in terms of arbitrariness, capriciousness or unreasonableness. However, the effect of the statute is to give substantial protection against arbitrary, capricious and unreasonable acts by the city.

Id. at 629. Accord Forsyth Citizens Opposing Annexation, et al. v. City of Winston-Salem, supra.

The willingness of the North Carolina Supreme Court to consider constitutional questions which are properly raised in state court proceedings is fully illustrated by its consideration of a Winston-Salem annexation. In Re

Annexation Ordinance #D-21927, 303 N.C. 220, 278 S.E.2d 224 (1981). In that case, the North Carolina Supreme Court considered several constitutional questions and addressed generalized grievances concerning the "reasonablenss" of the annexations and held: (1) that the annexation statutes were not an unconstitutional delegation of authority by the state to the governing boards of municipalities; (2) that the statutes were not unconstitutionally vague; (3) that the fact that persons residing within the annexed areas did not get to vote on the matter did not violate either due process or equal protection; (4) that the residents of the annexed areas were protected in their rights to receive municipal services such that no constitutional questions were at issue in that regard;

(5) that unilateral annexation was not unconstitutional as "taxation without representation" pursuant to either due process or equal protection guarantees; and, (6) that the annexation statutes were not unconstitutional on the grounds that judicial review is provided by a judge sitting as trier-of-fact, rather than by way of a jury trial. 303 N.C. at 224-30, 278 S.E.2d at 228-30.

It is obvious from this North Carolina Supreme Court decision and numerous other cases that the North Carolina courts have frequently reviewed constitutional issues in annexation cases. For example, the state courts have considered the applicability of due process guarantees of the Fifth Amendment of the United States Constitution, in addition to those guarantees provided by the Fourteenth Amendment.

E.g., Moody v. Town of Carrboro, supra. The state courts have applied an equal protection analysis in appropriate instances (unlike the annexations herein challenged). E.g., Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). The North Carolina Supreme Court has demonstrated its willingness to declare annexations to be invalid. E.g., Hawks v. Town of Valdese, 299 N.C. 1, 261 S.E.2d 90 (1980); see also, Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967). The North Carolina Supreme Court will consider whether an annexation based solely upon the desire to generate revenue is invalid. See, In Re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 19, 249 S.E.2d 698, 708 (1978). Further, consistent with the foregoing authority, the state court will

consider impropriety in the annexation process itself if allegations of the same are supported by "competent and substantial evidence". In Re Annexation Ordinance Adopted by the City of Charlotte, 284 N.C. 442, 452, 202 S.E.2d 143, 149 (1974)(challenging an annexation on grounds that "the City 'acted arbitrarily, capriciously, and unreasonably in that it did not uniformly apply the same standards throughout the entire Annexation Area'"). In the Charlotte case cited above, the North Carolina Supreme Court found the annexation of petitioner's land to be invalid and reversed the inclusion of petitioner's lands within the annexed area on the basis of an unreasonable application of the annexation statutes. 284 N.C. at 457, 202 S.E.2d at 152. See also, Forsyth Citizens, supra; In re

Durham Annexation Ordinance, 66 N.C.App. 473, 311 S.E.2d 898 (1984).

It is clear from these opinions that the statutory annexation requirements are carefully reviewed to ensure compliance with constitutional principles.

IV. CONCLUSION

Appellees respectfully submit that the decision of the North Carolina Court of Appelas presents no substantial federal question and is consistent with long-standing principles of law articulated by the United States Supreme Court. The constitutionality of the North Carolina annexation statutes and the review afforded in state court under those statutes has been established in both state and federal courts. For the reasons set forth above, Appellees respectfully submit that this Court should affirm the decision of

the North Carolina Court of Appeals or dismiss the appeal as not presenting a substantial federal question.

Respectfully submitted this 20th day of August, 1984.

Roddey M. Ligon, Jr.
Counsel of Record

WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Drawer 84
Winston-Salem, NC 27102
(919) 721-3600

Ronald G. Seeber

Ralph D. Karpinos
City Attorney's Office
115 City Hall
Winston-Salem, NC 27101
(919) 727-2056

Attorneys for Appellees

August 20, 1984

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

JUDGMENT

THIS CAUSE came on for hearing on plaintiffs' motion for summary judgment as to their first and second causes of action, and on defendants' motion for summary judgment, before the undersigned at the Federal Courthouse in Greensboro, North Carolina on Friday, October 1, 1982. At the hearing on said motions the plaintiffs were represented by Mr. Rosbon D. B. Whedbee of Winston-Salem, North Carolina and by Mr. James Hamilton of

the Washington, D.C. law firm of Ginsburg, Feldman, Weil and Bress, Chartered; and the defendants were represented by Roddey M. Ligon, Jr. of the Winston-Salem law firm of Womble, Carlyle, Sandridge & Rice, and by City Attorney Ronald G. Seeber. The Court, having considered the pleadings, affidavits, motions, briefs, and oral arguments, adjudges as follows:

1. Plaintiffs' First Cause of Action.

The plaintiffs moved for summary judgment on their first cause of action asserting that the annexations by the City of Winston-Salem challenged by this action are unconstitutional in that they cannot be subject to proper judicial review under state law. With respect to this contention, this Court adopts the opinion of Chief Judge Ward entered in the case of Baldwin, et al. v. City of Winston-Salem, et al., C-81-838-WS,

filed July 28, 1982, and dealing with the same issue as that raised in this portion of plaintiffs' motion.

The memorandum opinion of Chief Judge Ward states, in part:

"Both the United States Supreme Court and the Fourth Circuit Court of Appeals have unequivocally resolved the dispositive legal issue presented in this case. In Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), the court stated:

> 'Hunter v. Pittsburgh (1907) 207 U.S. 161, 178-179, 28 S.Ct. 40, 52 L.Ed. 151, declared that annexation by a city or town is purely a state political or legislative matter, entirely within the power of the state legislature to regulate. Its language was sufficiently broad, as an unfriendly commentator has observed, "to dispose of every conceivable challenge to annexation." . . . Thus, it has been held to foreclose attacks on a state procedure specifically on either due process or equal protection grounds.'

Accord, Carlisle v. City of Charlotte, ____ F.Supp. ____ (W.D.N.C. 1982)(C-C-81-533-M,

July 13, 1982).

This Court is bound to follow the decision of the Fourth Circuit and cannot distinguish its language from the facts of this case.[1] Plaintiffs fail to state a claim upon which relief can be granted under the fourteenth amendment.

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Partial Summary Judgment be, and same hereby is, DENIED. For the reasons stated therein, the plaintiffs' motion for summary judgment as to its first cause of action must be denied.

2. Plaintiffs' Second Cause of Action.

The plaintiffs next move for summary judgment on their second cause of action.

---

[1]Exceptions to the rule stated in Berry v. Bourne, 588 F.2d 422, 423-424 (4th Cir. 1978), do not arise in this case."

They assert that the annexations by the City challenged in this action are unconstitutional because persons such as plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman reside or operate businesses in the annexed areas but do not own real property in the annexed areas; and, therefore, cannot seek judicial review of the annexation under the North Carolina statutes. The defendants respond that the North Carolina law allows any property owner—not just real property owners—to challenge North Carolina annexations. During oral argument counsel for the plaintiffs and defendants advised the Court that Henry Brewer, Robert M. Bircham and Gladys Norman are parties plaintiff to a pending action in the Superior Court of Forsyth County, North Carolina, which said action challenges the validity of the annexations involved here. Consequently, this

is of the opinion that this portion of plaintiffs' motion for summary judgment is moot. This Court does not feel that these plaintiffs may, at this time, contend in this Court that they do not have a right to contest the annexations in state court when they are in fact at this time contesting the annexations in state court. Thus, the Court feels that the plaintiffs' motion for summary judgment as to their second cause of action must be denied. The Court holds, however, that should the state court judicially determine that the above-named plaintiffs do not have standing to contest the validity of the annexation in state court, plaintiffs would be authorized to reopen this case in order to raise this issue at that time.

3. Defendants' Motion for Summary Judgment.

The defendants move for summary judgment

as to all of plaintiffs' claims. For the reasons stated herein, as well as those stated in the Memorandum Opinion of Chief Judge Ward adopted by this Court, the defendants' motion for summary judgment should be allowed.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiffs' motion for summary judgment on the first cause of action is denied; that plaintiffs' motion for summary judgment on the second cause of action is deemed to be moot and thus denied subject to the right of plaintiffs Henry Brewer, Robert M. Bircham and Gladys Norman to reopen this case in the event the state coult should hold that said plaintiffs do not have standing in the state court action; and, the defendants'

motion for summary judgment is allowed.

s/Richard C. Erwin
United States District Judge

November 16, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

HENRY BREWER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-82-801-WS
	)	
CITY OF WINSTON-SALEM, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER OF DISMISSAL

This matter came before the court for a hearing on October 1, 1982 for ruling on plaintiffs' motion for summary judgment as to the first cause of action, plaintiffs' motion for summary judgment as to its second cause of action, and defendants' motion for summary judgment. For the reasons stated in the judgment, IT IS ORDERED that this action be, and the same hereby is, dismissed. However, the plaintiffs Henry Brewer, Robert M. Burcham and Gladys

Norman shall have leave to reopen this case in the event that the state court holds that they do not have standing in the annexation proceeding now before it.

s/Richard C. Erwin
United States District Judge

November 16, 1982

APPENDIX B

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment prohibit arbitrary actions by municipalities in annexing territory?

2. Does the due process clause continue to require judicial review by state courts of constitutional challenges to state action?

(From "Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit" in Baldwin, et al. v. City of Winston-Salem, et al. No. 83-572)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the MOTION TO DISMISS OR AFFIRM was served on opposing counsel on the 24th day of August, 1984.

Kay Craig

James Hamilton

Robert L. Deitz

Ginsburg, Feldman and Bress, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, NC 27106

FILED
SEP 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HENRY BREWER, *et al.*,
Appellants,

v.

CITY OF WINSTON-SALEM, N.C., *et al.*,
Appellees.

On Appeal from the North Carolina Court of Appeals

APPELLANTS' REPLY BRIEF

James Hamilton
Counsel of Record
Robert L. Deitz
Ginsburg, Feldman and Bress,
Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, N.C. 27106

Attorneys for Appellants

September 13, 1984

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Table of Contents

	Page
rgument	1
onclusion	8

Table of Authorities

Cases: Pa

Baldwin v. City of Winston-Salem,
710 F.2d 132 (4th Cir.),
cert. denied, 104 S. Ct. 536 (1983) . . . . . .

Hunter v. City of Pittsburgh,
207 U.S. 161 (1907) . . . . . .

In re Annexation Ordinance,
303 N.C. 220, 278 S.E.2d 224 (1981) . . . . . .

Moody v. Town of Carrboro,
301 N.C. 318, 271 S.E.2d 265 (1980) . . . . . .

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-152

HENRY BREWER, et al.,

Appellants,

v.

CITY OF WINSTON-SALEM, N.C., et al.,

Appellees.

On Appeal from the North Carolina
Court of Appeals

APPELLANTS' REPLY BRIEF

ARGUMENT

Appellants hereby oppose appellees' Motion to Dismiss or Affirm appellants' appeal from the North Carolina Court of Appeals' decision in Forsyth Citizens Opposing Annexations, et al. v. City of

Winston-Salem, et al., 67 N.C. App. 165, 312 S.E.2d 517, pet. denied, ___ N.C. ___, 315 S.E.2d 701 (1984).

1. Appellees' motion highlights the significance of the constitutional issues before this Court. They declare (at 11-12) that controlling decisions of this Court -- most particularly Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) -- hold that "the Fourteenth Amendment's Due Process Clause does not apply to annexations by municipal corporations" and that "a state's authority to modify the boundaries of its political subdivisions is 'unrestrained' by the Fourteenth Amendment's Due Process Clause." Surely this untenable notion, which unfortunately pervades various state and lower federal court decisions,1/ should be refuted by this

---

1/ See, e.g., In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224, 228 (1981).

Court. Appellees' claim demonstrates that this case involves substantial constitutional issues that this Court should resolve.

2. Appellees contend (at 7, 20) that "[c]ontrary to Appellants' allegations, the scope of judicial review of annexations in North Carolina is not limited" and that "[i]t is very clear from the decisions of the North Carolina Supreme Court and Court of Appeals that annexations are subject to judicial review for alleged constitutional infirmities, including the general complaints of unreasonableness raised by Appellants." It is difficult to fathom how appellees can make this assertion, which is diametrically contrary to the contentions in their motion in limine (Jurisdictional Statement, App. G) -- a

fact they conveniently fail to deal with here. In that motion, appellees asserted, as appellants do here, that judicial review is strictly "limited" to the three issues set forth in the North Carolina annexation statutes. See App. G at 8g. Appellees were successful in this argument before both the superior court and the North Carolina Court of Appeals, which held that the statute "limits the scope of judicial review to the determination of whether the annexation proceedings substantially comply with the requirements of the statutes" and that "[a] separate test of the reasonableness of an annexation is not included within the limited scope of judicial review." Jurisdictional Statement, App. B at 5b. The court of appeals relied for this proposition on

In re Annexation Ordinance, 303 N.C. 220, 278 S.E.2d 224 (1981), which is the definitive and binding North Carolina Supreme Court decision interpreting the State's annexation statute. Appellees' disturbingly contradictory advocacy serves to emphasize the unconstitutional strictures on review imposed by the North Carolina statute.

3. Appellees' claim (at 6) that the North Carolina annexation statutes "give substantial protection against arbitrary, capricious, and unreasonble acts by a municipality" is belied by the result in this case. Here appellants raised serious, factually-based claims that the challenged annexation was arbitrary and unreasonable, but these claims were not considered on their merits by the superior court or the court of

appeals. Nor, under the statute, could North Carolina courts consider, for example, whether an annexation was motivated by a bribe or Plan to dilute the black vote.2/

4. Appellees are incorrect in asserting (at 4) that all appellants here were involved in Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir.), cert. denied, 104 S. Ct. 536 (1983). Two appellants in this case did not participate in the Baldwin case. But the fears expressed in the petition for certiorari in Baldwin -- that the substantial constitutional issues there

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2/ While North Carolina courts have examined the constitutionality of the North Carolina annexation statute itself -- see, e.g., Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980) -- these courts will not examine whether conduct effecting an annexation is arbitrary and thus unconstitutional.

raised would not be reviewed by North Carolina courts -- now have become manifest since these issues were in fact not reviewed.

CONCLUSION

For the reasons stated here and in appellants' Jurisdictional Statement, this Court should accept jurisdiction and consider this appeal in plenary fashion.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert L. Deitz

GINSBURG, FELDMAN AND BRESS,
Chartered
1700 Pennsylvania Avenue, N.W
Washington, D.C. 20006
(202) 637-9000

Rosbon D.B. Whedbee
3307 Bonbrook Circle
Winston-Salem, N.C. 27106

Attorneys for Appellants

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